v. *Colonial Gold Co.*, 93 Mass. 283. The opinion declares, however, that in the absence of statutory authority a suit in equity could not be maintained for the collection of taxes assessed upon property. See *Heine* v. *The Levee Commissioners*, 19 Wall. (U. S.) 655. Though such a proposition seems to have the support of the authorities, it is submitted that upon principle exception may be taken. It is conceded that when there exists a power to tax, incidental to power to incur the debt, a duty to tax, dependent upon a valid debt, and a refusal by the proper official to enforce the tax, mandamus will lie to make that officer perform his ministerial duty. *Thompson* v. *Allen County*, 115 U. S. 550. If, however, the official resigns before he can be served with the writ, it seems to follow that we have a clear case for equity jurisdiction. There is no adequate and complete remedy at law. *Rees* v. *City of Watertown*, 19 Wall. (U. S.) 107. So on well recognized theories it seems that equity, even without express statutory authority, should see that the recalcitrant officer's duty is done, ordering its own official to levy and collect the taxes named, in conformity with the laws of the state for the collection of such taxes. *Welch* v. *Ste. Genevieve*, 1 Dill. (U. S.) 130. See *Supervisors* v. *Rogers*, 7 Wall. (U. S.) 175.

TAXATION — PARTICULAR FORMS OF TAXATION — APPLICATION OF INHERITANCE TAX TO EXECUTION BY FOREIGN WILL OF POWER CREATED IN DOMESTIC WILL. — A, by a New York will, gave B a power of appointment over a trust fund. B, in a New Jersey will, exercised the power in favor of C. Both B and C came within the one per cent class of the New York Transfer Tax Act of 1897. Under the law existing when A died they would have been exempt. *Held*, that C takes the fund free from the New York transfer tax. *In re Kissel's Estate*, 121 N. Y. Supp. 1088 (Sur. Ct.).

Estates created by the execution of a power of appointment are as a general rule treated as if created by the instrument raising the power. Thus a suspension of alienation in the second instrument is invalid if such would have been its effect annexed to the estates in the first instrument. *Genet* v. *Hunt*, 113 N. Y. 158. And the validity of the exercise of a power is tested by the law of the jurisdiction in which it was created. *Cotting* v. *De Sartiges*, 17 R. I. 668. But for the purposes of taxation, statutes both in England and in this country have treated the estates of the appointees as derived from the donee of the power. *Attorney-General* v. *Upton*, L. R. 1 Exch. 224; *Appeal of Seibert*, 110 Pa. St. 329; N. Y. TAX LAW, § 220, par. 5. The tax upon the execution of the power is not a tax upon property but upon the exercise of a privilege. *Chanler* v. *Kelsey*, 205 U. S. 466. There appears no reason why the estate of the appointee should not be taxed under both instruments since both are necessary to his title, but such is not the interpretation put upon the statutes. *Vandiest* v. *Fynmore*, 6 Sim. 570; *Matter of Howe*, 86 N. Y. App. Div. 286. In the principal case, since the creation of the power was not taxable and since its execution was effected under a New Jersey instrument, the decision seems sound.

TELEGRAPH AND TELEPHONE COMPANIES — STATUS OF COMPANIES AS ENGAGED IN PUBLIC EMPLOYMENT — OBLIGATION TO SERVE ALL AT REASONABLE RATES. — *Held*, that a telegraph company is entitled to service from a telephone company at the same rates as other business customers. *Postal Telegraph-Cable Co. of Tennessee* v. *Cumberland Telephone & Telegraph Co.*, 43 N. Y. L. J. 165 (U. S. Circ. Ct., Mid. D. Tenn., March 31, 1910).

On a general theory that the value of service to the consumer is a factor in the determination of rates, the defendant sought to justify the differentiation in the principal case. Recent federal authority, indeed, allows a carrier in rating different commodities to charge most heavily those which can best afford to pay. *Interstate Commerce Commission* v. *Chicago Great Western Railway Co.*, 141 Fed. 1003. But, as another circuit had recognized, where the cost of carrying different

kinds of goods is the same, to permit a company to charge different prices is to give it a right to hamper prospering industries and pamper those in distress, against that public policy which lies at the root of the law of public service. See *Tift* v. *Southern Railway Co.*, 138 Fed. 753. And as to customers receiving identical service, to admit that the successful shall pay more than the struggling is simply to say that a railroad or telephone corporation may levy a progressive income tax. By the principal case it is decided that one in the public employment may not charge what the particular customer can pay; it remains to be determined that he may not charge for a particular service what the traffic will bear. See *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92.

TRUSTS — RESTRAINTS ON ALIENATION OF CESTUI'S INTEREST — SPENDTHRIFT TRUST CREATED BY BENEFICIARY. — X, a spendthrift, conveyed an estate to Y, on trust to pay X during his life such sums out of the profits as Y should think proper. It was expressly provided that Y should not be compellable to pay X any part of the profits; and that on the death of X the *corpus* together with accumulations was to go to the appointees of X. *Held*, that the estate is liable for the subsequent debts of X. *Petty* v. *Moores Brook Sanitarium*, 67 S. E. 355 (Va.).

Even in jurisdictions where spendthrift trusts are upheld when created by a third party, they are invalid if founded for the grantor's own benefit. *Schenck* v. *Barnes*, 156 N. Y. 316; *Jackson* v. *Von Sedlitz*, 136 Mass. 342. It is axiomatic, however, that unless a *cestui* has an enforceable claim against his trustee there is nothing which his creditors can reach. *In re Coleman*, 39 Ch. D. 443; *Davidson's Executors* v. *Kemper*, 79 Ky. 5. Where the trustee has discretion merely as to the mode of applying the fund, the *cestui's* interest is available for his debts. *Snowdon* v. *Dales*, 6 Sim. 524; *Stewart* v. *Madden*, 153 Pa. St. 445. But in the case considered the *cestui* has no claim which equity would enforce, and it is difficult to see against what interest the creditor levied equitable execution. *Holmes* v. *Penny*, 3 K. & J. 90. See GRAY, RESTRAINTS ON ALIENATION, 2 ed., §§ 163–166. The creditor is amply protected in such a case by holding the trustee accountable for actual payments to the *cestui* after notice of the claim. *In re Neil*, 62 L. T. N. S. 649. The court, following a recent decision, regards the scheme employed as an evasion of the law and hence against public policy. *Menken* v. *Brinkley*, 94 Tenn. 721. If this is true, it is submitted that the remedy is to have the conveyance set aside rather than to levy equitable execution.

TRUSTS — RESULTING TRUSTS — EFFECT OF PARTIAL FAILURE OF CHARITABLE TRUST ON POWER OF SALE. — A devised land to his executors on trust to sell the same and divide the proceeds among named charities. As to eleven-seventeenths of the land the trust failed. The executors sold the land to B, and the heirs asked for a partition thereof. *Held*, that although the eleven-seventeenths passed to the heir as intestate property, the executors under their power of sale gave good title to the whole. *Bender* v. *Paulus*, 90 N. E. 994 (N. Y.).

It has been held that where a trust fails for vagueness, the devise fails as well and the property goes as intestate. *Scott* v. *Brownrigg*, 9 L. R. Ir. 246. But according to the prevailing view, if the purposes of a trust fail partially or wholly, the devisees hold the property on a resulting trust to the heirs. *Longley* v. *Longley*, L. R. 13 Eq. 137; *Sims* v. *Sims*, 94 Va. 580. Since, however, a resulting trust connotes something analogous to intestacy as to the beneficial interest, and since the testator devised his absolute interest to the executors, the latter should hold rather on a constructive trust. See 5 HARV. L. REV. 392, 393. In New York, statutes making invalid certain gifts to charities are regarded as limiting the testator's power to give, so that the devise fails to the same extent as the trust and the legal title goes *pro tanto* to the heirs. *Jones* v. *Kelly*, 170 N. Y. 401; *Chamberlain* v. *Chamberlain*, 43 N. Y. 424. For this construction there is some authority. *Doe* v. *Wrighte*, 2 B. & Ald. 710. *Contra*, *Russell* v. *Jackson*, 10 Hare